Supreme Court, U. S.
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No. 80-198

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1980

RONALD S. BOUCHER,
Petitioner,
vs.
CITY OF HAVRE and COUNTY OF HILL,
political subdivisions of the
State of Montana,
Respondents.

ON WRIT OF CERTIORARI
TO THE MONTANA SUPREME COURT

PETITION

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QUESTION PRESENTED

Whether a state court which summarily invoked a new, unexpected and unforseeable procedural rule to bar a litigant from all judicial redress for Respondent's civil wrongs thereby violated the Due Process Clause of the Fourteenth Amendment.

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CITY OF HAVRE and COUNTY OF HILL,
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PETITION FOR A WRIT OF CERTIORARI
TO THE MONTANA SUPREME COURT

The petitioner Ronald S. Boucher respectfully prays that a writ of certiorari issue to review the opinion and order of the Montana Supreme Court entered in this proceeding on March 26, 1980.

OPINIONS BELOW

The rulings of the state district court are not reported. The opinion of the Montana Supreme Court is reported at 609 P.2d 275 (Mont. 1980), and appears in the Appendix hereto.

JURISDICTION

The opinion below of the Montana Supreme Court was entered on March 26, 1980. A timely petition for rehearing was denied April 30, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourteenth Amendment, United States Constitution:

> ...No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

United States Code, Title 28:

§1257: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3)...By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Montana Code Annotated (1979)

§2-9-305: The text of this statute is reprinted in the Appendix.

STATEMENT OF THE CASE

Petitioner was shot in the back by a police officer employed by the Respondents as he was fleeing from the scene of a suspected break-in of a convenience food store in the early morning hours of September 25, 1974. The policeman used a twelve gauge, short barrel shotgun which fired shells comprising nine .30 caliber pellets. One of these pellets lodged in Petitioner's spine and permanently paralyzed him below the waist.

At the time of the incident, Petitioner was a medium-size juvenile. In his deposition the police officer admitted that Petitioner did not appear to be armed and did not pose any threat to himself or anyone else. Appendix, infra, at A-35-36.

Petitioner instituted an action in state court pursuant to the terms of the State of Montana's governmental tort claims act, which is now codified at Montana Code Annotated (1979), §2-9-101 et seq. He named the Respondents and the police officer as defendants. He also instituted an action in federal district court under the terms of 28 U.S.C. §1331 and 42 U.S.C. §1983. Only the state court

action is directly at issue in this Court, although the effect of the Montana Supreme Court decision on the federal claim has important ramifications here.

Petitioner's state court trial was set to begin December 11, 1978. Before that date, counsel for Petitioner stipulated to a dismissal with prejudice of the claim against the individual police officer. There is no dispute that no compensation or settlement of any kind was ever paid to Petitioner for this dismissal. Instead, counsel for Petitioner stipulated to the officer's dismissal because under Montana law the officer was effectively immune from personal liability for all his actionable conduct arising out of the course and scope of his employment.

There is also no dispute that the Respondents were not parties to the stipulation and that Petitioner did not intend for the stipulation to have any effect upon Petitioner's claims against Respondents.

Nonetheless, after the officer was dismissed, Respondents moved for summary judgment seeking dismissal of all claims on the basis that the procedural dismissal of the officer exonerated all the govern-

mental entities. The trial court summarily denied the motion, but Respondents then petitioned the Montana Supreme Court for an extraordinary writ of supervisory control. Respondents sought review of a number of issues in that petition, including, inter alia, the trial court's denial of summary judgment.

Respondents' petition was briefed and argued to the supreme court and, after thirteen months' delay, on March 26, 1980, the court set aside the trial court ruling and ordered the trial court to enter a judgment of dismissal of the Respondents, barring thereby all litigation on the merits of Petitioner's claims for his physical injuries.

Within the narrow, ten-day time frame allowed, Petitioner petitioned the state court for a rehearing on the basis that the decision was so unsupportable and harsh that it violated "the most elemental maxims of jurisprudence and fundamental fairness" and "deprived this young man of his day in court." Appendix, infra, at A-21. The state court summarily denied the petition on April 30, 1980, and this petition followed.

RAISING THE FEDERAL QUESTION

A federal question may be timely raised for purposes of review by this Court if it is presented first in a petition for rehearing when that question arises because of the unexpected construction of a state law by a state court. See Bohannan v. Arizona ex rel Smith, 389 U.S. 1, 4 (1967) (Douglas, J., dissenting) "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." Herndon v. Georgia, 295 U.S. 441, 444 (1934). See also Saunders v. Shaw, 244 U.S. 317, 320 (1917).

In all candor, Petitioner admits not having used the magical words "denial of 14th Amendment right to due process" in his petition for rehearing to the Montana Supreme Court. In the limited time available, however, Petitioner did fully apprise the court of the plenary effects of its decision and did argue that the decision was "in contravention of the most elemental maxims of jurisprudence and fundamental fairness." Appendix, infra at A-21.

It is axiomatic that the term "fundamental fairness" is alone a complete correlate of the term "due process." This Court has held that explicit enunciation of the constitutional provisions at issue was not strictly necessary if they were argued in the lower court, although "not explicitly identified in the brief with the motions for a new trial." Wright v. Georgia, 373 U.S. 284, 291 (1963). Here the court was fully informed of the unfair impact of its unexpected decision denying Petitioner an opportunity to seek judicial redress, and was given as full an opportunity by Petitioner as was possible to remedy the situation. This Court has held that "a party is not barred by failure to cite below the proper consitutional provisions when the lower courts consider the relevant provisions." Dyke v. Taylor Implement Co., 391 U.S. 216, 217-218 n.3 (1968).

Alternatively, Petitioner asks the Court to invoke its power of review under the Rule 40(1)(d)(2) doctrine of plain error if it should find insufficient notification to the state court of the constitutional error, in that the deprivation of

Petitioner's rights under the constitution were so heinous as to demand appellate review. See Vachon v. New Hampshire, 414 U.S. 478, 479 n.3, (1974). This Court has "consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." Henry v. Mississippi, 379 U.S. 443, 447 (1965).

ARGUMENT FOR GRANTING THE WRIT

I. PETITIONER HAD NO FAIR WARNING THAT A PURELY PROCEDURAL DISMISSAL OF SUIT AGAINST A NON-RESPONSIBLE PARTY UNDER STATE LAW WOULD OPERATE TO BAR COMPLETELY HIS CLAIMS AGAINST THE LEGALLY LIABLE PARTIES.

The decision of the Montana Supreme Court struck the Petitioner like a lightning bolt out of the blue. As we shall show below, because the express language of the controlling state statute effectively precludes any recovery from the police officer, Petitioner had no reason to expect that his purely procedural step of stipulating to dismiss an unnecessary party from the lawsuit would operate

to preclude adjudication of the merits of his claims and bar all recovery from the proper parties. The unexpected harshness of that result violated Petioner's rights to due process in state courts.

This case thus focuses upon the rights of litigants with politically and legally controversial claims to have due process in the decision making of state courts. The Fourteenth Amendment guarantee of due process "extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930). State court decisions therefore must not "deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." Id. at 682.

The decision below destroyed Petitioner's constitutional and statutory right to seek direct redress against political subdivisions of the State of Montana in state court for injurious conduct of the government's employees. And, Petitioner had

no real opportunity to protect that right because the court invoked an unprecedented rule which unexpectedly ignored the express language set forth in the state statute which controlled governmental liability for tort claims.

In the context of state court construction of criminal statutes, this Court has recognized that there can be "no doubt" that due process is violated by "unforeseeable and retroactive judicial expansion of narrow and precise statutory language." Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). In Bouie the Court pointed out that in civil cases, also, due process imposes upon state courts certain requirements of decisional consistency. When a court "overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law in 'its primary sense of an opportunity to be heard and to defend (his) substantive right.'" Id. at 354 (quoting Brinkerhoff-Faris at 673.

In other contexts this Court has overturned state rules which trench upon a

person's access to the judicial system. The Court has emphasized: "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 U.S. 371, 377 (1971). See also Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1973).

Petitioner had no meaningful opportunity to litigate his case against the proper parties on the merits. Instead, the state court intervened to block litigation of his claims for the police use of excessive force, claims which were obviously both politically and legally controversial and which could have resulted in a substantial damage recovery against the governmental entities.

II. THE STATE COURT DECISION WAS UNEXPECTED AND PLAINLY ERRONEOUS.

The express language of the Montana tort claims act was unexpectedly ignored and

implicitly set aside by the state court decision. Petitioner had no reason to anticipate such a result. Neither the language of the statute nor prior decisions of this state court or any other court supports the rule now invoked by the state court.

The controlling statute is found in the act setting forth rules and procedures for judicial resolution of tort claims against governmental entities. Montana Code Annotated (1979) §2-9-101 et seq. That act was adopted pursuant to the 1972 Montana Constitution which provided that "governmental entities shall have no immunity from suit for injury to person or property, except as may be specifically provided by law by a 2/3 majority vote of each house of the legislature." Art. II, Section 15.

The express language of the act plainly dictates a different rule than was invoked by the court below. First, the governmental entity is directly and primarily liable "for its torts and those of its employees acting within the scope of their employment." M.C.A. (1979) §2-9-102. Second, the act expressly purports "to

provide for immunization and indemnification of public officers and employees...." M.C.A. (1979) §2-9-305(1). Third, in any action for the conduct of a governmental employee "the governmental entity employer shall be made a party defendant to the action." M.C.A. (1979) §2-9-305(2). Fourth, once the government has been made a party, recovery against that entity "shall constitute a complete bar to any action or recovery against the employee...." M.C.A. (1979) §2-9-305(3). Finally, for all but intentional torts, the government official shall be indemnified by the governmental employer for all judgments and expenses. M.C.A. (1979) §2-9-305(4).

Taken together these sections effectively preclude recovery against the individual employee and demonstrate that only the Respondents were the real parties in interest to the lawsuit. As such, there was no reason to include the officer in the suit. To retain him as a party and subject him to the agony and expense of trial when there was no possibility of recovery against him would have been, at the least, unfair and ethically questionable.

Nonetheless, the state court invoked a new procedural rule that dismissal of a non-responsible party--without any compensation or consideration--exonerates the liable parties and bars all litigation of the merits of the injured person's claims. To support that rule the court relied on Barnes v. McGee, 21 N.C.App. 287 (1974) and DeGraff v. Smith, 62 Ariz. 261, 157 P.2d 342 (1945), for the proposition that a dismissal of the employees was res judicata as to every issue raised by the pleadings. That reliance was unfortunately misplaced; both cases concerned common law tort actions for conduct of employees of private businesses not, as here, statutory direct liability of governmental entities for actions of their employees.

The court also sought to support its decision by analogizing to prior decisions concerning the effect of the release of one joint tortfeasor on the remaining joint tortfeasors under common law rules, namely Beedle v. Carolen, 115 Mont. 587, 148 P.2d 599 (1944) and McCloskey v. Porter, 161 Mont. 307, 506 P.2d 845 (1973). Again, that citation of authority lends no support

to the court's decision. First, the state court has expressly overruled both those cases in a decision rendered only weeks before the instant decision. Kussler v. Burlington Northern, ___ Mont. ___, 606 P.2d 520 (1980). In part, the court based its decision in Kussler on the harshness of the common law rule respecting release of joint tortfeasors which "leads to results not intended by the parties." P.2d at 524. The court failed to even mention the Kussler decision in its opinion in this case.

Second, in all of these cases, the action involved common law principles of liability--not a statutory basis--and recovery against the remaining tortfeasors was denied because the plaintiff had already received some compensation in exchange for the release of one joint tortfeasor. The court tried to overcome that distinction by bootstrapping the language of the stipulation of dismissal here, "with prejudice," to the ruling in Schuster v. Northern Co., 127 Mont. 39, 257 P.2d 249 (1953). Schuster held that the effect of a dismissal with prejudice was to bar further suit against the party who had been

dismissed. However, persons who were not party to the agreement to dismiss were unaffected by the dismissal. Thus, here the dismissal "with prejudice" should only have precluded Petitioner from suing the officer again; it should have had no effect whatsoever on the Respondents who were not parties to the agreement.

Because the express language of the tort claims act clearly made the police officer an unnecessary party to the litigation and because there was no case authority remotely on point to support the outcome reached by the court, the court had to fabricate its new rule whole cloth. In doing so, it acknowledged that it was going to elevate form over substance and not look to the facts surrounding the stipulation. See Appendix, infra, at A-10. No other court has gone so far. All other relevant federal and state cases have clearly rejected such a rule. See, e.g., Garrett v. Jeffcoat, 483 S.2d 590 (4th Cir. 1973); Munson v. United States, 380 S.2d 976 (6th Cir. 1967); Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d 60 (1970).

III. THE FACTS OF THE INSTANT CASE DEMONSTRATE THE NEED FOR SUPREME COURT REVIEW OF ARBITRARY AND CAPRICIOUS DECISIONS OF STATE COURTS.

Petitioner respectfully submits that the outrageousness of the result here draws into focus the very purposes behind adoption of the Fourteenth Amendment; in part, to provide citizens of states guarantees of due process and equal protection against arbitrary and capricious actions of state governments as well as against the federal government.

This Court has emphasized that the Fourteenth Amendment concept of due process is central to the American system of dispute-settlement in the courts. Boddie v. Connecticut, 401 U.S. 371, 375 (1971). Because states have a monopoly over "techniques for binding conflict resolution," to be acceptable this system "must function strictly within these bounds" so we can "maintain an ordered society that is also just." Id.

The arbitrary, unprecedented rule invoked by one branch of state government here operates to shield another branch

of state government from a substantial claim for damages. The rule had the politically expedient effect of avoiding all adjudication of the merits of this controversial fact situation. Such a result is highly reminiscent of earlier Fourteenth Amendment cases wherein state courts created new, retroactive procedural rules to preclude constitutional adjudication of allegedly improper actions taken by other state government entities. This Court has never before tolerated such unfair state court actions. See, e.g., Wright v. Georgia, 373 U.S. 284, 291 (1963); N.A.A.C.P. v. Alabama, 357 U.S. 449, 456-458 (1958).

The shock waves of the Montana Supreme Court decision also reach beyond the instant case. Now, Respondent City of Havre has moved to dismiss the pending federal §1983 action on the basis of the judgment dismissing the state case, arguing that the federal court must give full faith and credit, res judicata, and collateral estoppel effect to the judgment of the state court. Appendix, infra, at A-37.

We submit that this domino effect of foreclosing all access to Petitioner to

have his claim heard in court violates the most fundamental notions of fairness inherent in the Fourteenth Amendment guarantee of due process. In shielding the government in the instant case, the court has also prejudiced the rights of all governmental employees who are clearly unnecessary parties to tort claims action. They now will have to be subjected to suit to prevent the kind of result as occurred here.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

DATED this 24th day of July, 1980.

Respectfully submitted,

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APPENDIX

OPINION OF THE SUPREME COURT
OF THE STATE OF MONTANA

STATE EX REL. CITY OF HAVRE Relator, vs. THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF HILL, and the HONORABLE BERNARD W. THOMAS, Judge thereof, Respondents.	)	No.14638 OPINION

Mr. Justice Gene B. Daly delivered the Opinion of the Court.

This is an original proceeding in which the City of Havre and the County of Hill have filed petitions for writs of supervisory control. The dispositive issue is whether a stipulation for dismissal with prejudice, entered into between plaintiff Boucher and defendant police officer Dramstad, bars the plaintiff from proceeding with his claim against the City of Havre and Hill County.

On September 24, 1974, the Havre Police Department received a call advising them that a burglary was in progress at a grocery store in North Havre, Montana. Officers Rex Dramstad and Kenneth Kooch were dispatched to the store to investigate. Upon their arrival at the scene, defendant Dramstad observed a suspect inside the store and ordered the suspect to come out. Once outside the store, the suspect began to run away from Officer Dramstad. In an attempt to apprehend the suspect, defendant Dramstad fired a shot which struck the suspect, plaintiff Ronald Boucher, in the back. This injury is the basis of the two civil actions initiated by the plaintiff against the City of Havre and County of Hill.

On September 27, 1976, plaintiff Boucher filed a complaint in Hill County District Court alleging that Officer Dramstad, the City of Havre and Hill County were liable for his injuries and all damages resulting from those injuries. Following extensive discovery, the case was set for trial on December 11, 1978. A pretrial conference was held December 11, 1978, where plaintiff

Boucher and defendant Dramstad entered into a stipulation for dismissal with prejudice of the claim against Officer Dramstad. The District Court, on the basis of the stipulation for dismissal, entered an order dismissing with prejudice the action against defendant Dramstad.

The remaining defendants, the City of Havre and Hill County, moved for summary judgment on the grounds that the dismissal with prejudice of their agent, Officer Dramstad, exonerated not only defendant Dramstad, but also the City and County as well since their liability could only be vicarious or derivative. The remaining defendants argued that they were entitled to a dismissal with prejudice. The remaining defendants' motions were denied by the District Court; and they now petition this Court for a writ of supervisory control contending the District Court erred in denying their motions for summary judgment.

The plaintiff's complaint stated that the relationship of respondeat superior existed between the City of Havre, the County of Hill, the State of Montana and

defendant Dramstad. In State v. District Court of Thirteenth Jud. Dist. (1976), 170 Mont. 15, 550 P.2d 382, we held that by reason of the 1972 Montana Constitution, Article II, section 18, and the State Tort Claims Act, section 2-9-102, MCA, et seq., a municipality and other political subdivisions are liable under the doctrine of respondeat superior for the negligence of an employee acting within the scope of his employment.

The City of Havre and Hill County contend that defendant Dramstad's dismissal with prejudice operates exactly the same as a jury verdict, and it therefore conclusively established that defendant Dramstad did not negligently or intentionally cause plaintiff's injuries. The City of Havre and Hill County further contend that the dismissal with prejudice of their employee collaterally estops the plaintiff from pursuing any claim against them as defendant Dramstad's employer, based upon the doctrine of respondeat superior.

The plaintiff contends that the dismissal with prejudice was only a trial tactic and it should not be given any

collateral estoppel effect. The plaintiff also contends that this Court should look behind the words "with prejudice" in order to determine the true intent of the parties. The plaintiff further contends that by looking behind the words "with prejudice," it is clear that the stipulation for dismissal with prejudice did not constitute a final adjudication on the merits; therefore, the plaintiff's claim against the City of Havre and Hill County should not be barred.

The issue in the instant case had resulted in a split of authority in other jurisdictions. Some courts have held that a consent dismissal with prejudice is tantamount to a judgment on the merits; and, accordingly, such a dismissal is res judicata as to every issue reasonably raised by the pleadings. See Barnes v. McGee (1974), 21 N.C. App. 287, 204 S.E.2d 203; DeGraff v. Smith (1945), 62 Ariz. 261, 157 P.2d 342. Other courts will look behind the words "with prejudice" and determine the intent of the parties. If it is determined that the parties did not intend the consent dismissal to resolve all of the issues raised by the

pleadings, then the principles of collateral estoppel will not be applied. See Denny v. Mathieu (1970), (Mo. 1970), 452 S.W.2d 114.

Although the facts of the instant case are unique, we find guidance from the prior decisions of this Court involving the effect of the release of one joint tortfeasor by the plaintiff. In Beedle v. Carolan, (1944), 115 Mont. 587, 148 P.2d 559, plaintiff Beedle was put in jail by the Rosebud County Sheriff at the insistence of the Rosebud County Attorney. The plaintiff was later released and thereafter brought suit against the Sheriff for false imprisonment. The suit was settled by the Sheriff, and a written release was executed by the plaintiff. Subsequently, the plaintiff attempted to sue the County Attorney for damages for the imprisonment. The District Court found that the release of the Sheriff served as a bar to the action against the County Attorney. This Court affirmed and said:

> "The words...mean that plaintiff has been fully compensated for any injuries arising out of the

> transaction; having been fully compensated he has no further cause of action. Nothing in the release in any way hints at a reservation of the right to sue the county attorney or anyone else because of the false arrest and, as we have said, that reservation must appear on the face of the instrument." 115 Mont. at 590.

In McCloskey v. Porter (1973), 161 Mont. 307, 506 P.2d 845, the plaintiff's deceased husband had been injured in an automobile accident when his car had collided with a car driven by the defendant, a minor. A Montana statute provided that a person who signs a minor's application for a driver's license was jointly and severally liable for any damages caused by the minor. In McCloskey the minor defendant's father had signed her driver's license application. The plaintiff and the father entered into and signed a written release. The plaintiff then attempted to proceed against the minor defendant, and the District Court

granted the defendant's motion for a directed verdict. This Court affirmed and said:

> "In Montana, the rule has long been established that the release of one joint tortfeasor releases the others, unless there are clear provisions in the release to the contrary." 161 Mont. at 311-312.

The stipulation for dismissal with prejudice in the instant case operates the same as does the release of one joint tortfeasor. Nothing in the stipulation for dismissal with prejudice in any way hints at a reservation of the right to sue the City of Havre and Hill County. As in the cases involving the release of one joint tortfeasor, that reservation must appear on the face of the instrument.

The stipulation for dismissal in the instant case was one "with prejudice." In Schuster v. Northern Co. (1953), 127 Mont. 39, 45, 257 P.2d 249, 252, we stated that:

> "The term 'with prejudice' as used in a judgment of dismissal has a well-recognized legal import. It is the converse of the term 'without prejudice', and a judgment or decree of dismissal with prejudice is as conclusive of the rights of the parties as if the suit had been prosecuted to a final adjudication adverse to the plaintiff."

Therefore, a stipulation of dismissal with prejudice of a defendant is tantamount to a judgment on the merits; and accordingly, such a dismissal with prejudice is res judicata as to every issue reasonably raised by the pleadings. Under the doctrine of respondeat superior, an employer defendant's liability is vicarious or derivative and does not arise until an employee acts negligently within the scope of his employment. A dismissal of a claim with prejudice of an employee is equivalent to a finding that the employee was not negligent. Under the doctrine of respondeat superior, such a dismissal of an

employee operates to exonerate the employer. This Court will look at the dismissal with prejudice on its face, and will not look behind the words "with prejudice."

The two judgments denying the motions for summary judgment by the City of Havre and the County of Hill are vacated and set aside. The two causes are remanded to District Court with directions to enter judgment with prejudice for both of the remaining defendants.

/s/ Gene B. Daly
Justice

We concur:

/s/ Frank J. Haswell
Chief Justice

/s/ John Conway Harrison

/s/ John C. Sheehy
Justices

Mr. Justice Daniel J. Shea dissents and will file a written dissent later.

DISSENT OF JUSTICE DANIEL J. SHEA

STATE EX REL. CITY OF HAVRE Relator,	)	
vs.	)	
THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF HILL, and the HONORABLE BERNARD W. THOMAS, Judge thereof, Respondents.	)	No. 14638 and No. 14645

Mr. Justice Daniel J. Shea dissenting:

I would affirm the order of the District Court. It is clear beyond question that the plaintiff did not intend to dismiss either the City or County. In this respect I cannot understand the failure of this Court to consider the impact of our recent case of Kussler v. Burlington Northern, Inc. and State of Montana (1980), ___ Mont. ___, ___ P.2d ___, 37 St.Rptr. 240.

The essential issue involves the effect given to a stipulation to dismiss with

prejudice, entered into between plaintiff and police officer Rex Dramstad, and an order putting this agreement into effect by dismissing with prejudice. The agreement to dismiss, and order to dismiss, are silent as to whether plaintiff intended also to dismiss the City or County as defendants. The City and County do not seriously contend that plaintiff intended to release them, but contend that the dismissal must have that effect, because any liability of the City or County can only be vicarious or derivative.

The essence of defendants' argument is that, regardless of plaintiff's intent, his release of Officer Dramstad, had the effect, by operation of law, of also releasing the City and the County. As inviting as this argument may appear, it ignores the realities of the situation. The intent of plaintiff in releasing only Officer Dramstad, is at the core of whether the City and County are entitled to receive the benefits of this dismissal.

The majority relies upon a definition of "with prejudice" in Schuster v. Northern Co. (1953), 127 Mont. 39, 257 P.2d 249; and

cites DeGaff v. Smith (Ariz. 1945), 157 P.2d 342; and Barnes v. McGee (N.C. 1974), 204 S.E.2d 203. In DeGraff and Barnes, the courts held that the employer was dismissed as a result of the plaintiff's dismissal of the defendant employee who was alleged to have been the actively negligent party. In both DeGraff and Barnes, it was the clear intent of the plaintiff not to dismiss against the defendant employer even though the defendant employee was dismissed.

In Schuster, supra, the plaintiff's case was dismissed "with prejudice" by the trial court, after a three year delay, and when, during trial, plaintiff announced he could not proceed with his proof because of an absence of witnesses. In affirming the dismissal, this Court simply defined the legal effect of a dismissal "with prejudice." This case has no bearing on the issue before this Court for plaintiff does not contend that he can still proceed to prosecute his action directly against Officer Dramstad.

Factually, neither DeGraff nor Barnes are similar to the present case. These

cases are not persuasive because in each situation the court ignored the uncontradicted intent of the plaintiff to dismiss only the defendant employee and to proceed against the defendant employer. The effect was that a benefit was conferred upon the defendant employer which was clearly not intended by the plaintiff and clearly not warranted by the facts.

Defendants contend that the dismissal of Officer Dramstad operates exactly as though a jury had ruled in favor of Officer Dramstad, and thus that the City and the County, by the same verdict, because of their derivative status, would also have been absolved of legal responsibility for plaintiff's injuries. This analysis was effectively rejected in Denny v. Mathieu (Mo. 1970), 452 S.W.2d 114, where the court held that a dismissal with prejudice does not operate in precisely the same manner as a jury verdict. Rather, the court held that, under its own practice rule relating to dismissals, that a "dismissal with prejudice actually adjudicates nothing" but only "serves as a mechanism for the termination of litigation

rather than adjudication of the issues therein involved." In so holding, the court reasoned that it was proper to go behind the words "with prejudice" to determine what was intended in light of the facts of the particular case. The court ruled that the intent of the plaintiff in agreeing to a dismissal, must be considered. If justice is one of the objectives of the law, this clearly is the proper rule.

In a somewhat different context, the question of intent was discussed recently in Brackenbrough v. MacCloskey (Or. 1979), 600 P.2d 481, where the appeals court ruled that parol evidence was admissible to establish whether the parties to a release with an integration clause, intended also to release a nonparty. In discussing previous Oregon cases involving similar issues, the court ruled that parol evidence was admissible to show the true intent of agreements whereby a person was seeking benefits conferred by an agreement to which he was not a party.

The issue in Brackenbrough was whether a doctor sued for malpractice, should be able to avail himself of a release agreement

between plaintiff and a party who was the active cause of the initial need of plaintiff to seek medical attention. Although the issue is not precisely the same here as it was in Brackenbrough, it is appropriate to compare the cases in terms of the parties who are seeking the benefits of an agreement to which they were not a party. In Brackenbrough, the court ruled that plaintiff could present parol evidence to show that he did not intend to confer release benefits upon the docotr. Here, it is effectively conceded that plaintiff did not intend to dismiss as against the City or the County. I can see no policy reasons why the City or the County should receive the benefit of a dismissal to which they were not a party, and for whom it was clearly not intended.

The majority here relies upon Beedle v. Carolan, Co. Attorney (1944), 115 Mont. 587, 148 P.2d 559, and McClosky v. Porter (1973), 161 Mont. 307, 506 P.2d 845, as authority for the proposition that the release of one joint tortfeasor releases the others, unless there are clear provisions in the release to the contrary.

With these cases serving as the essential underpinnings for its rationale, the majority concludes here that the stipulation for dismissal with prejudice contained nothing which in any way hinted at a reservation of the right to sue the City of Havre or Hill County, and that such a reservation must appear on the face of the instrument if the plaintiff is to proceed with his case.

What the majority fails to consider is that in Kussler (less than two months ago) we specifically overruled Beedle and McCloskey. Indeed, Kussler overruled the legal proposition, relied upon by the majority here, that the release of one joint tortfeasor releases the others, unless there are clear provisions in the release to the contrary. Kussler, supra, 37 St.Rptr. at 244-245.

In Kussler, we adopted the approach taken by the Arizona Supreme Court in Adams v. Dion (1973), 109 Ariz. 308, 509 P.2d 201. In Adams, the plaintiff was injured in a car wreck which involved joint tortfeasors. One of the tortfeasors was released. The other was the defendant in the case. The law in Arizona had been

that a release of one released all. The court listed several reasons for rejecting the common law rule: the rule is a trap for the unwary; it stifles the desire of the victim to compromise; and it leads to results not intended by the parties. As a result, the court adopted the rule "that the release of one joint tortfeasor is not a release of any other joint tortfeasor unless the document is intended to release the other tortfeasors, or the payment is full compensation, or the release expressly so provides." 509 P.2d at 203. As we noted in Kussler, this rule was adopted from the Restatement (Second) of Torts §885. The United States Supreme Court also adopted the rule to apply to antitrust litigation. Zenith Radio Corp. v. Hazeltine Research (1971), 401 U.S. 321, 344, 91 S.Ct. 795, 809, 28 L.Ed.2d 77, 95.

In accordance with the spirit of the rule announced in Kussler, consideration should be given to the intent of the parties who executed the stipulation for dismissal. There can be no question here that the plaintiff did not intend that the City or County receive the benefit of the dismissal.

Nor does the City or County have the temerity to make this assertion.

Neither the City nor the County will incur any prejudice because the police officer was dismissed from the lawsuit. Plaintiff must still prove his cause of action against the police officer before the City or County is compelled, under the doctrine of respondeat superior, to respond by the payment of damages.

The order of the District Court permitting the case to proceed to trial on the merits should be affirmed.

/s/ Daniel J. Shea

Justice

IN THE SUPREME COURT OF
THE STATE OF MONTANA

STATE EX REL. CITY OF HAVRE, Relator, vs. THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF HILL, and the HONORABLE BERNARD W. THOMAS, Judge thereof, Respondents.	)	No. 14638 PETITION FOR REHEARING

With all due respect, we are compelled to say that the effect of this Court's decision rendered on March 26, 1980, totally shocks the conscience. By its holding, the Court has utterly deprived the Plaintiff, Ron Boucher, of his rights under the Constitution, Article II, Section 13, and the laws of this State to bring suit in the state courts against the governmental entities for his personal injury.

This result is both unimaginably harsh and utterly unsupportable. We would submit

that one would be hard pressed to find another case in Montana jurisprudence which so outrageously elevates form over substance, in contravention of the most elemental maxims of jurisprudence and fundamental fairness.

The most fundamental, critical, and determinative fact overlooked by the Court is this--under the Montana Tort Claim Act, Officer Dramstad is effectively immune from personal liability. As such, Mr. Morrison's simple, straightforward decision to dismiss him from the case was clearly the only fair and reasonable thing to do. Why should the governmental employee, Dramstad, be named a defendant and subjected to that agony and expense if there was absolutely no way that he would ever be personally liable under the laws of this state?

But no, this Court overlooked the fact of Dramstad's nonliability, did not even mention it, and instead deprived this young man of his day in court. Ron Boucher can receive nothing now in state court, and must live paralyzed, without relief, simply because his lawyer saw the obvious futility

of including Dramstad in the case and moved to have him dismissed.

What logic is there to a ruling dismissing all the potentially responsible parties under state law simply because a person who is immunized by state law from responsibility is dismissed from the case? We submit that there is no logic to that harshest of all results.

I.

THE COURT OVERLOOKED THE PLAIN FACT THAT UNDER THE POLICIES AND RULES OF STATE LAW AND THE CONSTITUTION OF THIS STATE, ONLY THE GOVERNMENTAL ENTITY CAN EVER BE HELD LIABLE FOR THE ACTS OF ITS EMPLOYEES--NEVER THE EMPLOYEE HIMSELF.

The Montana Constitution of 1972 abolished the traditional common law rule of sovereign immunity. Article II, Section 18. Under the Constitution, the Legislature may only provide such immunity by two-thirds vote of the Legislature. Pursuant to that, the Legislature passed the Montana Comprehensive State Insurance Plan and Tort Claims Act. Sec. 1, Ch. 380, L.

1973. That act had two essential purposes: (1) to provide for governmental insurance, and (2) to provide a procedure for handling tort claims.

Several crucial sections of that act were never addressed in the Court's decision.

A) The purpose of the Tort Claim Act was expressly "to provide for immunization and indemnification of public officers and employees . . ." M.C.A., §2-9-305(1).

B) The governmental entity is itself primarily liable both for its torts and the torts of its employees. M.C.A., §2-9-102.

C) The government must be a party to any action. M.C.A., §2-9-305(2).

D) Any recovery against the government completely bars any recovery against the employee. M.C.A., §2-9-305(3).

Thus, the government must be named as a defendant in the suit, and, if recovery is had against the government, all recovery is barred against the employee. Under such circumstances, it makes utterly no sense to include the employee. All recovery against

him for any and all "actionable conduct" (whether it be intentional or not) will be barred by recovery against the government. The Court, in its decision, totally overlooked that crucial fact. If the employee is effectively immune from responsibility, why should his dismissal operate to dismiss the entities which the law clearly makes responsible for all his "actionable conduct"?

II.

THE COURT OVERLOOKED THE FACT THAT THE TORT CLAIMS ACT OPERATES IN DEROGATION OF THE COMMON LAW AND THUS, ANY COMMON LAW RULES ARE NOT AT ISSUE HERE.

Enacted pursuant to the Constitution's abolition of common law sovereign immunity, the Tort Claim Act must control the outcome here. "In this state there is no common law in any case where the law is declared by statute." M.C.A., §1-1-108. Moreover, "statutes establish the law of this state respecting the subject to which they relate, and their provisions and all proceedings under them are to be liberally

construed with a view to effect their objects and to promote justice." M.C.A., §1-2-103.

The citizens of this State spoke out clearly when they constitutionally abolished the doctrine of sovereign immunity under the common law. With the Tort Claims Act, that immunity was clarified and partially limited by the Legislature. However, the express "objects" of the Tort Claims Act were to immunize and indemnify employees while providing a scheme for governmental liability. And "justice" certainly is not promoted when an injured person loses his constitutionally provided right to recover against a governmental entity simply because previously overruled common law principles are applied improperly to the Tort Claims Act.

The Court overlooked the fact that the decisions in the two obscure cases relied on--Barnes and DeGraff--as its sole minority authority, were based on common law principles that have been expressly abrogated or overruled in this state. In both Barnes and DeGraff, the employees who were dismissed were employees of private business, not governmental employees,

and the plaintiff's cause of action was based upon common law principles of negligence, not a state Tort Claims Act.

III.

THE COURT OVERLOOKED THE CONTROLLING POLICIES AND PRINCIPLES EXPRESSED IN ITS RECENT DECISION IN THE KUSSLER CASE.

In its opinion in this case, the Court acknowledged that the facts here were "unique" and then, nevertheless, looked to earlier Montana cases for "guidance". In particular, the Court looked to cases concerning the legal effect of release of one joint tortfeasor on the remaining joint tortfeasors. Beedle v. Carolan, 115 Mont. 587, 148 P.2d 559 (1944); McCloskey v. Porter, 161 Mont. 307, 506 P.2d 845 (1973). We must emphasize, however, that the Court's reliance on these cases was totally misplaced.

First, both decisions were expressly overruled in Kussler v. Burlington Northern, ___ Mont. ___, 37 St.Rptr. 240, (1980). In Kussler, the Court made clear that the reasons for overruling those earlier cases

was that the former rule of those cases: (1) is "a trap for the unwary", (2) "it stifles the desire of the victim to compromise", and (3) it "leads to results not intended by the parties." These rationales clearly apply to the instant case. Notably, the Kussler decision was never even mentioned by the Supreme Court in its decision in this case.

These same reasons apply even more forcefully here because Dramstad, the employee, was legally not a joint tortfeasor at all. Under Montana law, he could never be held personally responsible for any "actionable conduct". Because the dismissed employee here was not a joint tortfeasor under Montana law, decisions based on common law rules regarding release of one joint tortfeasor are simply inapplicable.

The Court also overlooked that in each prior common law decision some compensation was paid as a part of the release of dismissal. In Beedle, McCloskey, and Kussler, the plaintiff was denied recovery from one defendant because, in part, he had already received some recovery from

the defendants released. Here Dramstad paid nothing, and need not have paid anything for his release because he could not, under any stretch of the law, have ever been held personally liable. It would have been unfair to require Dramstad to pay compensation which he never would have been ultimately liable for. And it is equally unfair to deny Mr. Boucher recovery here simply because the non-liable Dramstad was released.

IV.

THE COURT OVERLOOKED THE CRUCIAL FACTUAL DISTINCTION BETWEEN THIS CASE AND ALL OTHERS IT RELIED ON--THE PLAINTIFF RECEIVED NO COMPENSATION WHEN HE DISMISSED THE EMPLOYEE <u>BECAUSE THE EMPLOYEE COULD NEVER BE HELD LIABLE UNDER THE TORT CLAIMS ACT</u>.

As noted above, in all the earlier cases the decision was based upon common law decisional rules, not under any federal or state Tort Claims Act. And, each case involved some recovery by the plaintiff. It is simply unheard of to permit such a

harsh result under a Tort Claims Act where there was no settlement or recovery of compensation at all.

V.

THE COURT OVERLOOKED THE CRITICAL DISTINCTION IN THE SCHUSTER CASE THAT DISMISSAL WITH PREJUDICE MEANT ONLY THAT THE PLAINTIFF COULD NOT SUE THE PERSON DISMISSED.

The Court placed great reliance on the case of Schuster v. Northern Co., 127 Mont. 39, 257 P.2d 249 (1953). That was also misplaced. In Schuster, the effect of a dismissal "with prejudice" was that the person who had been dismissed could no longer be sued. Persons who were not parties to the agreement to dismiss with prejudice were totally unaffected by the dismissal. The term "with prejudice", therefore, clearly only refers to the plaintiff's ability to bring suit against Officer Dramstad--it has no relationship whatsoever to his ability to bring suit against persons who were not dismissed.

CONCLUSION

For all the foregoing reasons, we would therefore respectfully request that this Court grant a rehearing to reconsider its opinion and affirm the decision of the district court below.

DATED this 4th day of April, 1980.

MORRISON, JONKEL,
KEMMIS & ROSSBACH

By /s/ William A. Rossbach

William A. Rossbach
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Missoula, Montana 59807

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 14638

STATE EX REL. CITY OF HAVRE
Relator,

vs.

THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF HILL, and the HONORABLE BERNARD W. THOMAS, Judge thereof,
Respondents.

ORDER

PER CURIAM:

Having considered the petition for rehearing filed herein,

IT IS ORDERED that the petition for rehearing is denied.

Dated this 30th day of April, 1980.

/s/ Frank J. Haswell

Chief Justice

/s/ Gene B. Daly

/s/ John Conway Harrison

/s/ John C. Sheehy

Justices

MONTANA CODE ANNOTATED (1979)

§2-9-305. Governmental entity to be joined as defendant--immunization and indemnification of employees. (1) It is the purpose of this section to provide for the immunization and indemnification of public officers and employees sued for their actions, other than intentional tort or felonious acts, taken within the course and scope of their employment.

(2) In an action brought against any employee of a state, county, city, town, or other governmental entity for a negligent act, error, or omission or other actionable conduct of the employee committed while acting within the course and scope of his office or employment, the governmental entity employer shall be made a party defendant to the action.

(3) Recovery against a governmental entity under the provisions of parts 1 through 3 of this chapter shall constitute a complete bar to any action or recovery of damages by the claimant, by reason of the same subject matter, against the employee whose negligence or wrongful act, error, or omission or other actionable conduct gave rise to the claim. In any

such action against a governmental entity, the employee whose conduct gave rise to the suit shall be immune from suit by reasons of the same subject matter if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of such employees' employment, unless the claim is based upon an intentional tort or felonious act of the employee.

(4) In any action in which a governmental entity employee is a party defendant, the employee shall be indemnified by the governmental entity employer for any money judgments or legal expenses to which he may be subject as a result of the suit unless the conduct upon which the claim is brought did not arise out of the course and scope of his employment or is an intentional tort or felonious act of the employee.

EXCERPTS OF POLICE OFFICER
DRAMSTAD'S DEPOSITION,
Dated September 5, 1978

Page 17, Line 23 to Page 18, Line 6:

Q. Which direction did you fire?
A. In the general direction of the suspect.
Q. By "general direction," were you aiming to hit him?
A. No.
Q. You were aiming to what; scare him?
A. I was aiming to a point to his right as he ran.
Q. Why were you aiming at that point?
A. To stop him. If I hit him in the legs, fine, if he stopped from the close proximity of it.

Page 52, Line 7 through Line 25:

Q. To your knowledge, at the time of the incident, did the suspect appear to be armed to you?
A. Not that I could tell.
Q. You didn't think that he was armed when he came out of the building?

A. I didn't think that he wasn't either.
Q. He didn't have any weapon in his hand?
A. Not that I could see.
Q. Was he making any attempt to injure you?
A. None.
Q. His only action, then, was to flee; it wasn't an agressive action on his part; is that correct?
A. That's correct.
Q. Was Mr. Boucher attempting to injur or threaten the life or any other person in the area?
A. No.
Q. So what your're saying is; you were not in fear of your life, or the life of another at the time of the incident?
A. That's correct.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

RONALD S. BOUCHER, Plaintiff,	)	
vs.	)	CV-80-66-GF
REX DRAMSTAD and CITY OF HAVRE, Defendants.	)	

MOTION FOR SUMMARY JUDGMENT

COMES NOW defendant City of Havre and moves the Court for summary judgment in favor of defendant City of Havre. This motion is made and based upon the pleadings and papers on file herein and the certified copies of the following documents attached hereto, to-wit:

1. Complaint dated September 24, 1976, filed in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Hill;
2. Order on Motion To Set Aside Dismissal dated February 10, 1977,

filed in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Hill; and

3. Order and Judgment dated May 16, 1980, filed in the District Court of the Twelfth Judicial District of the State of Montana, in and for the County of Hill.

This Motion is made upon the ground and for the reason that there is no genuine issue as to any material fact with respect to res judicata, collateral estoppel and full faith and credit to be given by this Court to the Judgment of the State District Court, and that this defendant is entitled to summary judgment as a matter of law.

DATED this 17th day of June, 1980.

JARDINE, STEPHENSON,
BLEWETT & WEAVER

By /s/ Jack L. Lewis
Attorneys for City of Havre
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FILED
AUG 29 1980
... JR., CLERK

No. 80-198

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

RONALD S. BOUCHER,

Petitioner,

vs.

CITY OF HAVRE and COUNTY OF HILL, political subdivisions of the State of Montana,

Respondents.

ON WRIT OF CERTIORARI
TO THE MONTANA SUPREME COURT

RESPONDENT CITY OF HAVRE'S BRIEF IN OPPOSITION

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No. 80-198

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No. 80-198

IN THE

SUPREME COURT OF THE UNITED STATES

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RONALD S. BOUCHER,

Petitioner,

vs.

CITY OF HAVRE and COUNTY OF HILL, political subdivisions of the State of Montana,

Respondents.

RESPONDENT CITY OF HAVRE'S BRIEF IN OPPOSITION

The Respondent, City of Havre respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the Montana Supreme Court

dated March 26, 1980.

REASONS WHY THE PETITION SHOULD BE DENIED:

JURISDICTION

Petitioner did not raise the lack of due process under the Federal Constitution in the State Court proceeding as is shown by the opinion of the Montana Supreme Court and by Petitioner's Petition for Rehearing. All of Petitioner's arguments dealt with the Montana Constitution and the state law. There was an adequate opportunity to raise the question in the brief filed by Petitioner prior to the Supreme Court ruling as well as in his Petition for a rehearing afterward. Therefore, under New York Central and H.R. Co. vs. New York, 186 U.S. 269, (1902), the petition should be denied.

STATEMENT OF THE CASE

The Petitioner's Statement of the

Case is nearly complete, but wrongfully asserts that the law officer is immune under Montana law for his actionable conduct (page 5). The statute §2-9-305, M.C.A. set forth in the Petition at A-33, requires the officer to be joined in the action and expressly provides that he is liable if he acted intentionally or feloniously. Furthermore, the Petitioner failed to state that the Complaint of Ronald Boucher alleged that the law officer acted negligently or knowingly, intentionally and maliciously. (Appendix Page A-5 herein). If an intentional act was proved, the law officer was liable.

In the Petitioner's Argument for Granting the Writ, it is asserted that the dismissal with prejudice of the law officer was only procedural since the law officer was immune. The argument overlooks the plain language of the statute §2-9-305, M.C.A. which Petitioner should have been

aware of. The dismissal was not of a "non-responsible party" as asserted now by the Petitioner but of a party liable for his intentional act, and the officer was the only person whose act could make the Respondent liable. The Montana Supreme Court ruled correctly under the pleadings and record before it as it followed the existing majority rule and did not overrule any prior Montana decision.

The responsibility of the Respondents here is vicarious whether based upon common law or statute and is a matter of state, not federal law. If that law, whether common law or statutory also provides, as the state court decision indicates, that a final release of the agent releases the principal, this is a matter of substantive state law and certiorari should not lie.

CONCLUSION

For these reasons, the Petition should be denied.

DATED this 19th day of August, 1980.

Respectfully submitted,

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Attorney for Resqondent, City of Havre

APPENDIX

IN THE DISTRICT COURT OF THE TWELFTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF HILL

RONALD S. BOUCHER,

Plaintiff, Civil NO. 15595

vs.

REX DRAMSTAD, CITY OF HAVRE, COUNTY OF HILL, STATE OF MONTANA,

Defendants.

COMPLAINT

COMES NOW the Plaintiff and for his cause of action against the Defendants complains and alleges as follows:

I.

That Plaintiff, Ronald S. Boucher, is a resident of the City of Havre, County, of Hill, State of Montana.

II.

That the Defendant, Rex Dramstad, is a

resident of the City of Havre, County of Hill, State of Montana, and at all times here mentioned was a duly appointed, employed and acting policeman of said City and County.

III.

That Defendant, City of Havre, is a municipal corporation, located within the boundary of Defendant, County of Hill, a political subdivision of the State of Montana.

IV.

That at all times herein mentioned, Defendant, Rex Dramstad, was employed by and acting as agent for the City of Havre, the County of Hill, and the State of Montana, acting under color of the laws, statutes, ordinances and regulations of the State of Montana and engaged in the performance of said duties as policeman for said City of

Havre. That the relationship of respondeat superior existed between the City of Havre, the County of Hill, the State of Montana and said Defendant, Rex Dramstad.

IV.

That on or about September 25, 1974, at approximately 3:40 a.m., the Havre Police Department received a phone call advising them of a possible burglary in progress at the Highway Grocery in North Havre, Montana; that the Havre police officers who were dispatched and responded to this call were officers Rex Dramstad and Kenneth Kooch.

V.

That upon arriving at the scene, the officers above mentioned observed broken glass near the front window of the Highway Grocery Store. Further investigation revealed someone inside of the building. That the officers then ordered the suspect

out of the building at gunpoint where he was advised that he was under arrest and asked to identify himself.

VI.

That the Plaintiff, Ronald S. Boucher, was the above mentioned suspect; and that he exited the grocery store building and was searched by the officers. That at this point in time, the Plaintiff, turned away from the officers and began moving away up the north side of the street.

VII.

That at this point, Defendant, Rex Dramstad, discharged his weapon, hitting the Plaintiff in the back, knocking him to the ground and seriously wounding him.

VIII.

That immediately after the shooting, the Plaintiff was rushed to the Northern Montana Hospital in Havre, Montana where he received

emergency medical care. That he was then transported by ambulance to Columbus Hospital in Great Falls, Montana, at which time he was operated upon for the gunshot wound. That by reason of the injury resulting to the Plaintiff from the aforesaid shooting which was done by the Defendant, the plaintiff was hospitalized for an extended period of time, from the 25th day of September, 1974, to the 12th day of February, 1975.

IX.

That as a proximate result of the said shooting, Plaintiff was injured and suffered complete paraplegia of his mid-torso on down.

X.

That the acts, conduct, and behavior of the Defendant Dramstad, were performed negligently, or in the alternative, knowingly, intentionally, and maliciously. That the Defendants, City of Havre, County of Hill, and

State of Montana, negligently exercised their official judgment in the hiring, training, and continued employment of the Defendant police officer. That the act of the Defendant, Dramstad, clearly demonstrated the use of excessive and abusive force under the circumstances, and further showed a gross disregard for the rights and safety of the person of the Plaintiff; the Plaintiff suffered excruciating pain, mental and physical pain and anguish, as well as a loss of present and future earnings, and present and future medical expenses, as a proximate result thereof.

WHEREFORE, judgment is prayed for as follows:

1. For the permanent paraplegic disability to the Plaintiff in the sum of Six Hundred Thousand Dollars ($600,000.00).

2. For the reasonable value of all incurred medical and hospital expenses in the sum of Twenty Five Thousand Dollars

($25,000.00).

3. For the reasonable value of all medical and hospital expenses expected to be incurred in the future, by reason of such injury in the sum of Fifty Thousand Dollars ($50,000.00).

4. For the reasonable value of damages sustained by loss of wages and future earning capacity in the sum of Nine Hundred Thousand Dollars ($900,000.00).

5. For the reasonable value of past, present and future pain, suffering and mental anquish in the sum of Six Hundred Thousand Dollars ($600,000.00)

6. For punitive damages to be assessed against Defendants Rex Dramstad and City of Havre in the sum of Five Hundred Thousand Dollars ($500,000.00).

7. For any other relief as the Court may

deem proper and equitable, including costs of suit.

DATED this 27th day of September, 1976.

DALEY & SHERLOCK

By /s/ Joseph F. Daley
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Supreme Court, U. S.
FILED
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No. 80-198

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

Ronald S. Boucher,

Petitioner,

v.

City of Havre and County of Hill, political subdivisions of the State of Montana,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Montana

RESPONDENT COUNTY OF HILL'S BRIEF IN OPPOSITION

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August, 1980

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Cruse, et al. v. Fischl, 175 P. 878, 55 Mont. 258 (1918) 6

DeGraff v. Smith, 62 Ariz. 261, 157 P.2d. 342 (1945) 3

Galimi v. Jetko, Inc., 514 Fed.2d. 949 (1975) 3

Garrett v. Jeffcoat, 483 So.2d. 590 (1973). 5

Jacoby v. Chouteau County, 112 Mont. 70, 112 Pac.2d. 1068 (1975). 3

Kingfisher v. City of Forsyth, 132 Mont. 39, 314 Pac.2d. 876 (1957) 4

Land v. U.S., 231 F.Supp. 883 (1964), aff'd., 342 F.2d. 785 (1965) 4

Lowney v. Butte Electric Co., 61 Mont. 492, 204 Pac. 485 (1921) 4

Marusa v. D.C., 484 F.2d. 828 (1973) 3

Matland v. U.S., 285 F.2d. 752 (1961). 4

Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d. 60 (1970) 5

Munson v. U.S., 380 So.2d. 976 (1967) 5

National Mfg. Co. v. U.S., 210 F.2d. 263 (1954), cert. den., 247 U.S. 967, 98 L.Ed. 1108, 74 S.Ct. 778 (1954) 3

Pritchard Petroleum Co. v. Farmers Co-Op Oil and Supply Co., 121 Mont. 1, 15, 190 P.2d. 55, 62 (1948) 6

Schwartz v. Inspiration Gold Mining Co., 15 F.Supp. 1030 (1936) 6

Spillway Marina, Inc. v. U.S., 445 Fed. 2d. 876 (1971) 3

State v. State Highway Comm., 267 P. 299, 82 Mont. 382 (1928) 6

State of Montana v. District Court, 170 Mont. 15, 550 Pac.2d. 382 (1976) 3

U.S. v. Faneca, 332 F.2d. 872 (1964) 4

Vaughn & Ragsdale Co. v. State Board of Equalization, 96 P.2d 420, 109 Mont. 52 (1939) 7

Williams v. U.S., 350 U.S. 857, 100 L.Ed. 761, 76 S.Ct. 100 (1955) 3

Witter v. Phillips County, 111 Mont. 352, 109 Pac.2d. 56 (1941) 3

UNITED STATES SUPREME COURT RULES:

Rule 17 1

UNITED STATES STATUTES CITED:

28 U.S.C.A. 1257(3) 1

28 U.S.C.A. §1346(b), §2680 3

FEDERAL RULES OF CIVIL PROCEDURE:

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MONTANA RULES OF CIVIL PROCEDURE:

Rule 41(b) 4

MONTANA STATUTES CITED:

Montana Code Annotated:

Montana Tort Claims Act:
Section 2-9-305(1) 2
Section 2-9-305(2) 2

TEXTBOOKS AND TREATISES:

35 AmJur2d, Federal Tort Claims Act, §§ 61,62. 3

53 AmJur2d 413, Section 406 4

57 AmJur2d 14 3

35 C.J.S. Federal Civil Procedure §775(a) 4

57 C.J.S. 421, Section 619(b) 4

9 Federal Practice & Procedure,
Wright & Miller, 229, §2373 4

5 Moore's Federal Practice,
§§ 41.02(2), 41.02(5), 41.05(2) 4

JURISDICTION:

A Federal question was never raised in the Montana Supreme Court; there are no "special" or "important" reasons for review. There was no unexpected construction of the Montana Tort Claims Act. It was construed as the Federal Tort Claims Act and similar acts passed to alleviate the harshness of sovereign immunity have been construed by most Federal and State Courts.

Petitioner admits (page 7 of Petition) that the "due process" argument raised here was never raised before. No Federal question was decided by the Montana Supreme Court. Rule 17 U.S. Supreme Court Rules; 28 U.S.C.A. 1257 (3).

QUESTION PRESENTED:

If a Federal question had been presented and decided, would the Montana Supreme Court decision have violated 14th Amendment due process in granting a summary judgment to the City and County against whom Petitioner brought an action under respondeat superior for the allegedly intentional and negligent conduct of a police officer, after Petitioner dismissed its action against that police officer "with prejudice".

STATEMENT OF FACTS:

A police officer interrupted a 3:00 A.M. burglary of a residence-grocery. After discovering blood on a broken window, the police officer saw and ordered Petitioner to come out, and advised him he was under arrest. Petitioner fled and the police officer, after giving three warnings, shot and wounded him. Petitioner pleaded guility to and was sentenced for the burglary.

Petitioner admitted that the officer advised him he was under arrest; that he was attempting to escape and that he told the officer he would have to shoot him. The officer did not know if Petitioner was armed.

Suit was commenced by Petitioner against the police

officer, the City of Havre and the County of Hill, political subdivisions of the State of Montana, under "respondeat superior" (page 4 of Complaint states "the relationship of respondeat superior existed between the City of Havre, the County of Hill * * * and said Defendant, Rex Dramstad."). In his memorandum in opposition to defendants' motion for summary judgment dated November 8, 1978, Petitioner argued that the doctrine of respondeat superior applied.

ARGUMENT:

Petitioner now argues that the Montana Tort Claims Act, hereinafter referred to as MTCA, found at A-33 of his Petition, "precludes any recovery from the police officer" (page 9 of Petition); that the MTCA "effectively precludes recovery against the individual employee * * * that only Respondents were the real parties in interest * * * that there was no possibility of recovery against the policeman" (page 14 of Petition) and that "the State Court invoked a new procedural rule that dismissal of a non-responsible party * * * exonerates the liable parties." (page 15 of Petition) These statements are not correct.

MTCA, Section 2-9-305(1), provides that the purpose of the action is "to provide for the immunization and indemnification of public officers and employees sued for their acts, other than intentional tort or felonious acts, taken within the course and scope of their employment."

MTCA also provides at 2-9-305(2): " * * * the employee whose conduct gave rise to the suit shall be immune from suit * * * if the governmental entity acknowledges or is bound by a judicial determination that the conduct upon which the claim is brought arises out of the course and scope of such employee's employment, unless the claim is based upon an intentional tort * * * of the employee."

Thus, the MTCA twice states that it excludes a governmental employee from immunity for an intentional

tort and alters the doctrine of vicarious liability for negligent torts only insofar as to take the right of indemnification from the governmental entity against its employee after the entity admits or there is a judicial determination of employer-employee relationship.

The County of Hill has always denied there was an employer-employee relationship and there has never been such a judicial determination.

The common law, general, and Montana rule is that a county is not liable for the negligence of its officers unless such liability is expressly fixed by statute, 57 AmJur2d 14, Witter v. Phillips County, 111 Mont. 352, 109 Pac.2d. 56 (1941), Jacoby v. Chouteau County, 112 Mont. 70, 112 Pac.2d. 1068 (1941).

The MTCA, like the Federal Tort Claims Act, hereinafter referred to as the FTCA, and similar acts were passed to alleviate the harshness of the common law sovereign immunity rule, and, with certain exceptions, to render the government liable as a private individual would be under like circumstances. 28 U.S.C.A §1346(b), §2680. Thus the State Court's reliance upon cases such as Barnes v. McGee, 21 N.C.App. 287, 204 S.E.2d. 203 (1974) and DeGraff v. Smith, 62 Ariz. 261, 157 P.2d. 342 (1945), is not "misplaced" (p. 15 of Petition) but appropriate. Such acts permit the governmental entity to be liable only in the manner and to the extent it has consented. Spillway Marina, Inc. v. U.S., 445 Fed.2d. 876 (1971). They grant a partial waiver only of sovereign immunity. Areskog v. U.S., 396 F.Supp. 834 (1975). Even the FTCA incorporated the common law rules of the state. Galimi v. Jetko, Inc., 514 Fed.2d. 949 (1975). Berretoni v. U.S., 263 F.Supp. 907 (Mont. 1967), Williams v. U.S., 350 U.S. 857, 100 L.Ed. 761, 76 S.Ct. 100 (1955), National Mfg. Co. v. U.S., 210 F.2d 263 (1954), cert. den., 247 U.S. 967, 98 L.Ed. 1108, 74 S.Ct. 778 (1954), Marusa v. D.C., 484 F.2d. 828 (1973), 35 AmJur2d, Federal Tort Claims Act, §§61, 62.

The Montana law prior to State of Montana v. District Court, 170 Mont. 15; 550 Pac.2d. 382 (1976) was that the

sovereign was immune from suit. Kingfisher v. City of Forsyth, 132 Mont. 39, 314 Pac.2d. 876 (1957), and Boettger v. Emp. Liability Assur. Corp., 158 Mont. 258, 490 Pac.2d. 717 (1971). State v. District Court, cited supra, held specifically that since the passage of the MTCA and the adoption of the 1972 Montana Constitution, Article II, Section 18, a master-servant relationship exists between a City and its police officers acting in the course and scope of their employment.

The common law, general and Montana rule is that if the Plaintiff exonerates the servant, he also exonerates the master whose liability can only be vicarious or derivative, 57 C.J.S. 421, Section 619b; 53 AmJur2d 413, Section 406; Lowney v. Butte Electric Co., 61 Mont. 492, 204 Pac. 485 (1921), and a dismissal "with prejudice" pursuant to stipulation and order is an adjudication on the merits under Rule 41(b) of the Montana Rules of Civil Procedure, which is the same as Rule 41(b) of the Federal Rules of Civil Procedure, and is res judicata of the matters covered by the claim. 9 Federal Practice & Procedure, Wright & Miller, 229, §2373;5 Moore's Federal Practice, §§ 41.02(2), 41.02(5), 41.05(2); 35 C.J.S. Federal Civil Procedure §775(a).

Federal Courts have also held that the United States is exonerated by a release of its employee under the FTCA applying state law. Matland v. U.S., 285 F.2d. 752 (1961), followed the state common law rule. See also Bacon v. U.S., 209 F.Supp. 811 (1962), aff'd., 32 F.2d. 880 (1963); Land v. U.S., 231 F.Supp: 883 (1964), aff'd., 342 F.2d. 785 (1965).

The MTCA excepts intentional torts from immunization or indemnification. The FTCA similarly excepts claims arising out of assault and battery and the Federal Courts have recognized such exceptions. Coffey v. U.S., 387 F.Supp. 539 (1975), U.S. v. Faneca, 332 F.2d. 872 (1964).

The Petition statement at page 17, "the express language of the tort claims act made the officer an unnecessary party

to the litigation" is also not correct. The statute quoted at A-33 of Petition specifically states:

> *"Governmental entity to be joined as defendant * * * (2) in an action brought against any employee of a * * * county, city, * * * or other governmental entity * * * the governmental entity employer shall be made a party defendant to the action. * * * (4) in any action in which a governmental entity employee is a party defendant, * * *."*

The language clearly intends the employee be made a party to the action.

The Petition states at page 17, "All other relevant Federal and State cases have rejected such a rule" (evidently speaking of the rule that the exoneration of the employee is also exoneration of the employer). Petitioner then cites three cases in support of this statement. The first, Garrett v. Jeffcoat, 483 So.2d. 590 (1973), was brought under the Federal Drivers Act (F.D.A.), which makes the United States solely liable for the negligent acts of its employees operating automobiles within the scope of their employment. The F.D.A. specifically does away with any claim against the employee, making the liability of the United States primary and exclusive. The MTCA does not.

The second case, Munson v. U.S., 380 So.2d. 976 (1967), which clearly recognizes the general rule to be that the release of the servant exonerates the master, simply holds that under the FTCA the U.S. is not entitled to indemnity, and therefore a release of the servant is not a release of the master since the reason for the rule, indemnification from the servant, no longer exists. The MTCA reserves the right to indemnity for an intentional tort of the servant, and for a negligent tort unless the governmental entity acknowledges or there is a judicial determination of the agency, therefore the reason for the rule enunciated in Munson does not exist.

The third case, Montoya v. City of Albuquerque, 82 N.M. 90, 476 P.2d. 60 (1970), was brought under a New Mexico statute which provides that either, but not both,

the municipality or the employee may be held liable. The case also recognizes the general rule that the release of the servant is a release of the master, but holds that since their statute requires the Plaintiff to elect, and specifically eliminates the derivative nature of the liability, the general rule does not apply. The MTCA does not require the Plaintiff to elect and does not eliminate the derivative nature of the liability.

The rule of construction applicable to a state statute is stated in Pritchard Petroleum Co. v. Farmers Co-Op Oil and Supply Co., 121 Mont. 1, 15, 190 P.2d. 55, 62 (1948):

> *" * * * a statute upon a subject governed by the common law is not presumed to make any alterations in that law further than is expressly declared, and * * * does not take away the common law save to the extent that it is expressly or by necessary implication so declared. 50 AmJur pp. 339-340, par. 346 and cases cited.*
>
> *"This is the rule in Montana * * * "*

A statute is not presumed to work any changes in the rules or common law beyond what is expressed in its provisions and those provisions do not alter common law unless the intent to do so is clear. Schwartz v. Inspiration Gold Mining Co., 15 F.Supp. 1030 (1936).

The Legislature clearly intended to retain the common law rules of indemnification for an intentional tort and where the agency relationship was not admitted or judicially determined, and specifically did so in the MTCA.

Petitioner's interpretation of the statute would render meaningless the language of the statute expressly reserving common law indemnification where the tort is intentional or where the agency relationship has not been admitted or judicially determined.

The statute is not ambiguous, and its letter may not be disregarded under the pretext of pursuing its spirit. Cruse, et al.v. Fischl, 175 P. 878, 55 Mont. 258 (1918); State v. State Highway Comm., 267 P. 299, 82 Mont. 382 (1928),

Vaughn & Ragsdale Co. v. State Board of Equalization, 96 P.2d. 420, 109 Mont. 52 (1939).

CONCLUSION:

1. There is no Federal question.
2. No Federal question was ever raised or decided.
3. Had there been a Federal question presented, there was no violation of due process. The Petition is based upon the incorrect contention that the MTCA eliminated all personal liability of governmental employees and the common law rule that exoneration of the servant is exoneration of the master.
4. Petitioner would have the Court ignore the rules of statutory construction and render those provisions of the MTCA meaningless which expressly reserve common law indemnification where the tort is intentional or where the agency relationship has not been admitted or judicially determined, which construction would be expressly contrary to the clear legislative intent.

The Petition for Writ of Certiorari should be denied.

RESPECTFULLY SUBMITTED this 26th day of August, 1980.

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